

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

OHIO VALLEY BISTROS, INC.,)	
)	
Plaintiff,)	2:06cv286
)	Electronic Filing
v.)	
)	
GMR RESTAURANTS OF)	Judge Cercone
PENNSYLVANIA, INC.,)	Magistrate Judge Caiazza
)	
and)	
)	
DARDEN RESTAURANTS, INC.,)	
)	
Defendants.)	

MEMORANDUM ORDER

On April 4, 2006, this case was referred to United States Magistrate Judge Francis X. Caiazza for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. §§ 636(b)(1)(A) and (B), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

On November 8, 2006, the magistrate judge issued a Report (Document No. 14) recommending that the District Court deny the Defendants' Motion to Dismiss Pursuant to Rule 12(b)(7) (Document No. 5).

Service of the Report and Recommendation was made on the parties. Objections (Document No. 15) were filed on November 24, 2006. The Response (Document No. 16) was filed on December 8, 2006.

After a *de novo* review of the pleadings and documents in the case, together with the Report and Recommendation and the Objections and Response thereto, the following order is entered:

AND NOW, this th18 day of December 2006,

IT IS HEREBY ORDERED that the Defendants' Motion to Dismiss Pursuant to Rule 12(b)(7) (Document No. 5) is **DENIED**.

The Report and Recommendation of Magistrate Judge Caiazza dated November 8, 2006, (Document No. 14) is adopted as the opinion of the court.

Defendants' objections are overruled. The fact that defendants will be raising a common defense centered on vagueness and ambiguity in both this and the parallel state litigation and/or theoretically face the possibility of inconsistent outcomes thereon does not render AT Land a necessary party to this litigation. See Field v. Volkswagon Werk AG, 626 F.2d 293, 302 (3d Cir. 1980). And the potential for "logical inconsistency [on the outcome of such defenses] does not make an absent party indispensable." Schulman v. S.P. Morgan Investment Management, 35 F.3d 799, 806 (3d Cir. 1993). Finally, the mere existence of concurrent state and federal litigation falls far short of the interest needed to warrant Colorado River abstention. Ryan v. Johnson, 115 F.3d 193, 198 (3d Cir. 1997).



David Stewart Cercone
United States District Court Judge

cc: The Honorable Francis X. Caiazza
United States Magistrate Judge

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